IN THE HIGH COURT OF BOMBAY AT GOA

APPLICATION FOR APPOINTMENT OF ARBITRATOR
NO. 23/2004

Shri Pradeep V. Naik,
resident of Ward No.3,
Fondvem, Ribandar, Tiswadi, Goa. ..... Applicant.

V/s.

(1)Mrs. Sulakshana A. Naik,
resident of House No.328,
Ward No.3, Fondvem,
Ribandar, Ilhas, Goa.

(2)Master Chinmai S. Naik,
C/o. Suresh V. Naik, resident
of Flat No.302, Ekdant Building,
S.K. Bhole, Road,
Agar Bazar, Dadar, Mumbai - 28. ..... Non-Applicants.

Shri D. Pangam, Advocate for the applicant.

Shri S.G. Dessai, Sr. Advocate with Shri A. Palekar, Advocate for non-applicant No.1.

Shri V. Bodke, Advocate for non-applicant No.2.

CORAM : S.S. PARKAR, J.

DATE : 1ST JULY, 2005.

ORAL ORDER :

Heard both sides. This is an application filed for appointment

of an arbitrator to resolve the disputes arising between the applicant and the non-applicants in the following circumstances:

There was a partnership agreement for carrying on certain business in the name of "Mudranand", entered into between the applicant and the non-applicants on 12.2.1988, which contained, inter alia, clause 17 for referring the disputes to the arbitrators. Clause 17 of the said agreement reads as follows :

> "17. In the event of any dispute or difference of opinion in the matter of interpretation, execution or carrying out the objects and functions of the enterprise, arbitrators and the arbitrators appointed shall amongst themselves appoint an Umpire. The decision of the arbitrators would be binding on the parties to the dispute. In the event of any difference amongst them the decision of the Umpire would be final and binding upon all concerned."

As there was a dispute between the parties, an Advocate's notice dated 25.6.2004 was addressed on behalf of the applicant to the non-applicants, followed by another notice dated 16.8.2004. Since the first notice dated 25.6.2004 was not replied by the non-applicants, notice dated 16.8.2004 was issued under clause 17 of the Deed of Partnership for appointment of an arbitrator. The applicant had named his Arbitrator and called upon the non-applicants to appoint their arbitrator. In response to the said notice of 16.8.2004, the non-applicant No.1 sent

reply dated 24.9.2004 stating therein that there was a reconstitution deed dated 1.4.1992 in which there is no provision for referring the dispute to the arbitrator. Thereafter, by his Advocate's reply dated 9.10.2004, the applicant had denied that he had signed any reconstitution deed of partnership. It is also stated that on inquiries made in the Office of Registrar of Firms, the applicant had been informed that the Partnership Deed dated 12.2.1988 had not been reconstituted. By the said letter, the non-applicants were called upon to furnish a copy of the alleged reconstituted partnership dated 1.4.1992. Inspite of the said letter, the non-applicants observed stoic silence and did not furnish the copy of the alleged reconstituted partnership dated 1.4.1982. Thereafter, the present application was moved in this Court under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter, referred to as `the Act' for short) for appointment of an arbitrator for resolving the disputes about the partnership between the two partners.

2 An application dated 13.4.2005 has been filed in this proceeding on behalf of non-applicant no.2 stating therein that he was minor when he was admitted to the benefit of the Partnership and after attaining the majority on 17.11.2004, he had given notice dated 11.4.2005 to the Registrar of Firms under Section 63(2) of the Indian Partnership Act, 1932, electing not to become the partner of the said firm Mudranand. Non-applicant No.1 has filed an affidavit dated 5th May,

2005 in this Court, inter alia, stating in paragraph (3) thereof that the new agreement dated 1.4.1992 was executed in the Office of M/s. Powar and Associates, Chartered Accountants of the Firm. She has annexed a copy of the Deed of Partnership dated 1.4.1992 to her affidavit. The applicant has filed rejoinder dated 15.6.2005, denying the execution of the alleged agreement dated 1.4.1992 by the applicant and denying his signature on the said document.

3. On behalf of non-applicant No.1 Mr. Dessai contended that since the new agreement dated 11.4.1992 does not contain the clause regarding reference of the disputes to an arbitration, the disputes cannot be referred to an arbitrator under Section 11 of the Act. According to him, since the same partnership has continued, as per the new deed of partnership, there was no reconstitution of the partnership firm and, therefore, registration of this document of partnership afresh was not required. According to him, the new agreement was entered into only for the purpose of obtaining some benefits under the Tax Laws providing for payment of salary to the working partners. Mr. Dessai contended that on comparison of the signatures of the applicant on the two documents, namely dated 12.2.1988 and 1.4.1992, denial of his signature on the application appears to be false and, therefore, since there is no agreement between the two for referring all the disputes to the arbitrator, no reference should be made under Section 11

of the Act for arbitration. He placed reliance on a decision of the Supreme Court delivered by M. Jagannadha Rao, J, sitting singly in the case of ***Wellington Associates Ltd., vs. Kirit Mehta,*** ((2000) 4 SCC 272), and contended that the Court will have to decide the question of existence of the Arbitration Agreement before referring the matter for arbitration.

4. No doubt, the said question was considered by the Supreme Court in the aforesaid decision and it was categorically held that Section 16 of the Arbitration Act does not take away the jurisdiction of the Chief Justice of India or his designate to decide the question of the existence of the arbitration agreement. It is further held that Section 16 does not declare that except the Arbitral Tribunal, none else can determine such a question and that merely because the new Act permits the arbitrator to decide this question, it does not necessarily follow that at the stage of Section 11, the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause.

5. On the other hand, on behalf of the applicant, reliance is placed on some of the decisions of the Supreme Court, including the decision of the Constitution Bench of the Supreme Court in the case of ***Konkan Railway Corporation Ltd., and anr. vs. Rani Construction***

Pvt. Ltd. ((2002) 2 SCC 388); and ***Hythro Power Corporation Ltd. vs. Delhi Transco Ltd.,*** ((2003) 8 SCC 35). Relying upon the Apex Court decisions, the learned Advocate appearing for the applicant submits that in view of the denial of her signature by the applicant on the alleged agreement of 1.4.1992, this Court under Section 11 of the Act cannot go into the controversial question about the execution of 1992 agreement between the parties.

6. The Constitution Bench of the Supreme Court in the case of ***Konkan Railway Corporation Ltd., and anr. vs. Rani Construction Pvt. Ltd. (supra),*** in paragraph 21 of the Judgment has held that if the Chief Justice or his designate nominates an arbitrator even before the expiry of period of 30 days and therefore, the Arbitral Tribunal had been improperly constituted and is without jurisdiction, it would be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction as contemplated by Section 16 of the Act. It is observed that Section 16 states that the Arbitral Tribunal may rule on its own jurisdiction and may rule on any objections with respect to the existence or validity of the arbitration agreement. This shows that according to the Supreme Court, by virtue of Section 16 of the Act, the Arbitral Tribunal is not confined to the width of its jurisdiction, but can go to the very root of its jurisdiction and, therefore, there would be no impediment in contending before the Arbitral Tribunal that it had been wrongly

constituted.

7. The later Judgment of the Supreme Court in the case of ***Hythro Power Corporation Ltd. vs. Delhi Transco Ltd., (supra)*** has considered the earlier decisions of the Supreme Court including the decision of the Constitution Bench in the case of ***Konkan Railway Corporation Ltd., and anr. vs. Rani Construction Pvt. Ltd. (supra)*** and has also referred to the Judgment of the Supreme Court in the case of ***Nimet Resources Inc. vs. Essar Steels Ltd.,*** ((2000) 7 SCC 497), which has considered the Judgment of the Supreme Court in the case of ***Wellington Associates Ltd. v. Kirit Mehta (supra).*** At this stage, it would be appropriate to quote paragraphs 6 and 7 of the Judgment of the Supreme Court in the case of ***Nimet Resources Inc. vs. Essar Steels Ltd., (supra)***, dealing with the Judgment in ***Wellington Associates Ltd.'s*** case. Paragraphs 6 and 7 of the said Judgment read as under :

> " 6. I am conscious of the fact that M. Jagannadha Rao, J. in ***Wellington Associates Ltd. v. Kirit Mehta*** held that the jurisdiction of the nominee of the Chief Justice of India to decide the question is not excluded by Section 16 of the Act and such a power can be exercised in a suitable case. On this basis, it is no doubt permissible under Section 11 of the Act to decide a question as to the existence or otherwise of the

> arbitration agreement but when the correspondence or exchange of documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, in terms of Section 7 of the Act, the appropriate course would be that the arbitrator should decide such a question under Section 16 of the Act rather than the Chief Justice of India or his nominee under Section 11 of the Act.
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> 7. I take this view because the power that is exercised by the nominee of the Chief Justice of India under Section 11 of the Act is in the nature of administrative order. In such a case, unless the Chief Justice of India or his nominee can be absolutely sure that there exists no arbitration agreement between the parties it would be difficult to state that there should be no reference to arbitration. Further such a view may not be conclusive in view of the nature of the powers that are exercised under Section 11(6) of the Act." (underlining supplied)

There the dispute was whether the correspondence exchanged between the parties spelt out an arbitration agreement. In that context, it was held that it is no doubt permissible under Section 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement, but when the correspondence or exchange of documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, the appropriate course would be that the

arbitrator should decide such a question under Section 16 of the Act. It was further observed in paragraph 7, as quoted above, that in such a case unless the Chief Justice of India or his nominee is absolutely sure that there exists no arbitration agreement between the parties, it would be difficult to state that there should be no reference to arbitration. Following the aforesaid observations in the case of ***Nimet Resources Inc. vs. Essar Steels Ltd.,*** (supra), the Supreme Court in the case of ***Hythro Power Corporation Ltd., (supra),*** observed as follows :

> " Whether on the facts mentioned above an arbitration agreement can be said to have existed by recourse to the arbitration clause in NIT was itself a dispute which deserved to be referred to the Arbitral Tribunal in accordance with the arbitration clause. Section 16 empowers the Arbitral Tribunal to decide the question of existence and validity of the arbitration agreement." (paragraph 11)

8. In the present case, there is no dispute about the execution of the first agreement dated 12.2.1988 between the parties. The dispute is as regards execution of the second agreement dated 1.4.1992 by the applicant in which there is no clause for arbitration. As stated earlier, the first agreement of 1988 does include the clause for arbitration. No doubt, the signatures of the applicant, on the two documents, appear to

be identical. But it is contended on behalf of the applicant that with the passage of time of four years, the signature of the applicant must have slightly changed. Even two signatures made at the same time mostly differ. But the fact that the two signatures of the applicant on the two documents are identical, there is every possibility that the signature of the applicant on the document of 1992 was forged. He points out and it is relevant to note that the signatures of partner at serial No.1 and guardian of partner at serial No.3 differ, but are not in dispute. In these circumstances, reliance placed on the signatures at serial Nos.1 and 3 on the two documents though they differ due to the passage of time and because the same person cannot sign identifically on two different occasions and the fact that the signature of the applicant is identical in both the documents, itself would create a doubt whether his signature on the agreement of 1992 was genuine or is forged.

9. In my view, since the signature of the applicant on the first agreement of 1988 is not disputed which provides for arbitration clause and the signature of the applicant on the agreement of 1992 which does not provide for arbitration clause is disputed, a contentious issue has arisen which cannot be decided under Section 11 of the Act by the Chief Justice or his designate in the present application. The sum and substance of the aforesaid decisions of the Supreme Court is that if, prima facie, there is an agreement between the parties, the dispute will

have to be referred for arbitration under Section 11 of the Act. Secondly, if the Chief Justice or his designate cannot absolutely be sure that there exists no arbitration agreement between the parties, there should be reference to arbitration as held by the Supreme Court in the case of ***Nimet Resources Inc. vs. Essar Steels Ltd., (supra),*** and affirmed in the case of ***Hythro Power Corporation Ltd.,(supra).*** Undoubtedly, the said issue can be raised by the non-applicants even before the Arbitral Tribunal which is empowered by Section 16 of the Act to consider any objection with regard to even the existence or validity of the arbitration agreement. That question cannot be considered under Section 11 as it cannot be decided unless the parties lead evidence to prove the execution of agreement of 1992 by the applicant. The contentious issue about the existence or absence of arbitration agreement can only be decided by the arbitrator under Section 16 of the said Act and not by the Chief Justice or his designate under Section 11 of the Act.

10. On behalf of non-applicant No.2, an application dated 13.4.2005 has been filed stating that non-applicant No.2 was minor when he was admitted to the benefit of the partnership and has attained the majority on 17.11.2004. He has given notice to the Registrar of Firms electing not to become the partner of the firm `Mudranand' on 11.4.2005 and has also given notice for publication in the Government

Gazette. As such, the dispute shall be referred for arbitration between the applicant and non-applicant No.1 only.

11. The arbitration clause provides for appointment of an arbitrator by either party who, in turn, will appoint an umpire. The applicant has already exercised his option and suggested the name of Advocate Mahesh Amonkar. Since the non-applicant No.1 has not exercised her option, I will have to appoint an Arbitrator on behalf of non-applicant No.1.

12. In view of the above, I allow this application and appoint Shri Gurudas Upendra Bhobe, Advocate as an Arbitrator for non-applicant No.1 who will act along with Advocate Mahesh Amonkar, an arbitrator appointed by the applicant, to resolve all the disputes arisen between the applicant and the non-applicant in respect of partnership business of "Mudranand". The two Arbitrators, in turn, will appoint the Umpire.

S.S. PARKAR, J.

ssm.